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SERVICE DATE - NOVEMBER 12, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34277

H&M INTERNATIONAL TRANSPORTATION, INC. – PETITION FOR DECLARATORY ORDER

Decided: November 10, 2003

In a petition filed on March 4, 2003, H&M International Transportation, Inc. (H&M) requests that the Board institute a declaratory order proceeding and determine that H&M is not a rail carrier subject to the Board's jurisdiction. This request arises from a January 22, 2002 decision by the Railroad Retirement Board (RRB)¹ finding that H&M is a rail carrier operating in interstate commerce with regard to 18 employees at its Marion, AR facility.² For the reasons discussed below, the request will be denied.

BACKGROUND

H&M is a privately held corporation, with principal offices in Jersey City, NJ. The company operates warehousing, distribution, trucking terminal, and intermodal facilities at Marion and several other locations in the United States.

According to H&M, the company provides similar services at each of its intermodal facilities. H&M primarily loads and unloads trailers and containers on and off railroad flat cars; moves trailers between parking places and ramp tracks for loading or unloading; lifts, stacks, flips and racks trailers and chassis in connection with the ramping process; ties down, secures, and releases equipment loaded onto or unloaded from rail cars; and inspects trailers and cargo for safety and inventory purposes. It provides these services pursuant to agreements with the respective railroads serving each facility.

¹ The RRB administers the Railroad Retirement Act and the Railroad Unemployment Insurance Act, which, as relevant here, define a covered employer as a railroad subject to the Board's jurisdiction. 45 U.S.C. 231(a)(1)(i); 45 U.S.C. 351(b).

² H&M has filed a petition for reconsideration with the RRB. However, the RRB has stayed its reconsideration proceeding to let the Board rule on the matter. The RRB has indicated that, once the Board has done so, the RRB will remove its stay and decide the petition before it based on the Board's determination. H&M Petition at 2.

H&M states that the company's Marion facility, while substantially similar to its other facilities and operated under a similar arrangement, differs from the other facilities in two respects: (1) Marion is the only facility where the company leases the property;³ and (2) it is the only facility where H&M moves rail cars. The Marion facility consists of six storage and four loading tracks ranging from 6,770 to 8,300 feet in length, several buildings and underlying real property, various ramps, cranes, and other loading equipment owned or leased by H&M, and parking lots for trucks, chassis, containers, and trailers. Most of the facility is surrounded by a chain link fence. The UP mainline runs nearby and two UP lead tracks connect the mainline to the delivery tracks. H&M employees use two leased switch engines to move cars between the delivery tracks and storage and loading tracks inside H&M's facility as needed to facilitate the intermodal work of the company.

According to H&M, its agreements with UP reserve all common carrier rights and obligations to UP and contractually bar H&M from providing common carrier service.⁴ H&M says it is also physically unable to offer such service, as it cannot operate beyond the bounds of its facility. Moreover, H&M states that it has never held itself out to provide rail service to the public for compensation, has not actually performed rail service for anyone else for compensation or otherwise, and has not sought regulatory approval for any of its activities. H&M adds that it has never published or participated in any rates for providing rail services to the public, and has no railroad reporting marks or identification assigned by the Association of American Railroads.⁵

DISCUSSION AND CONCLUSIONS

The Board has broad discretion to issue declaratory orders to terminate a controversy or remove uncertainty. 5 U.S.C. 554(e); 49 U.S.C. 721. The Board need not institute a declaratory order proceeding here, however, because the record makes clear that H&M is not a rail carrier subject to the Board's jurisdiction.

The Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. 10501(a). The term "transportation" is defined to include a facility related to the movement of property by rail, and services related to that movement, including receipt, delivery, transfer, and handling of property. 49 U.S.C. 10102(9)(A), (B). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5).

³ H&M leases the Marion facility from the Union Pacific Railroad Company (UP) pursuant to a 1-year lease that continues year-to-year until terminated by the parties. H&M Petition at 3.

⁴ Ramp Contractor Agreement, Section 1A. See H&M Petition at 3 n.2.

⁵ H&M also notes that the Marion facility has been designated under Arkansas law as a "trucking sector business."

Whether a particular activity constitutes transportation by rail carrier under section 10501 is a fact-specific determination. H&M's intermodal transloading activity could fit within the broad definition of transportation. See, e.g., Green Mountain Railroad Corporation – Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002) (cement transloading facility); Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001) (automobile unloading facility). But this is only half of the statutory requirement for Board jurisdiction under section 10501.

To fall within the Board's jurisdiction, the transportation activities must be performed by a rail carrier, and the mere fact that H&M moves rail cars inside the Marion facility does not make it a rail carrier. To be considered a rail carrier under the statute, there must be a holding out to the public to provide common carrier service. B. Willis, C.P.A., Inc. – Petition for Declaratory Order, STB Finance Docket No. 34013 (STB served Oct. 3, 2001), aff'd per curiam, B. Willis, C.P.A., Inc. v. STB, No. 01-1441 (D.C. Cir. Nov. 26, 2002), cert. denied, 72 U.S.L.W. 3235 (Oct. 7, 2003) (No. 02-1498); Hanson Natural Resources – Non-Common Carrier Status – Petition for Declaratory Order, Finance Docket No. 32248 (ICC served Dec. 5, 1994). Here, however, H&M's operations are performed pursuant to agreements with UP that reserve for UP all common carrier rights and obligations and that, in fact, specifically bar H&M from providing common carrier service. Additionally, H&M has never received, nor sought, a license from the Board for common carrier freight rail operations under 49 U.S.C. 10901 (or an exemption from the licensing requirements pursuant to 49 U.S.C. 10502). Further, there is no evidence that H&M has provided any type of rail service to the public for compensation or otherwise, or held itself out as willing to do so. Indeed, the record shows that any rail-related activity performed by H&M is strictly in-plant, for H&M's convenience and benefit, and in furtherance of its non-rail primary business purpose.

Nor is there any evidence that UP has control over H&M's business operations. To the contrary, H&M has specifically stated that all car movements within its facility are "at the direction of, under the supervision of, and for the convenience of H&M." H&M Petition at 4. Moreover, the record indicates that UP's obligations and common carrier duty begin and end at the delivery tracks at the H&M facility. Finally, there is no evidence that the movement of cars inside the fence of H&M's Marion facility would be considered an integral part of UP's common carrier service.

For all of these reasons, the record shows that H&M is not a rail carrier subject to the Board's jurisdiction. No reason exists to institute a proceeding to gather additional evidence.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. H&M's request to institute a proceeding is denied.

2. This decision is effective on November 12, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary